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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 DANIEL S. POOL,  
12 Inmate No. P7404D13,

13 Plaintiff,

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15 vs.  
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19 NORMAN PRESECAN; MARISSA McCLURE;  
20 L.F. TURLEY; LITERARY REVIEW BOARD;  
21 SOUTHIPONG; VILLCANA; FERRARA,

22 Defendants.  
23  
24

Civil No. 14cv0150 GPC (WVG)

**ORDER:**

(1) **GRANTING PLAINTIFF'S  
MOTION TO PROCEED *IN*  
*FORMA PAUPERIS*, IMPOSING  
NO INITIAL PARTIAL FILING  
FEE AND GARNISHING  
BALANCE FROM PRISONER'S  
TRUST ACCOUNT PURSUANT  
TO 28 U.S.C. § 1915(a)  
[ECF No. 2];**

(2) **DENYING MOTION TO  
APPOINT COUNSEL [ECF No. 3]**

**AND**

(3) **DIRECTING U.S. MARSHAL  
TO EFFECT SERVICE OF  
COMPLAINT PURSUANT TO  
FED.R.Civ.P. 4(c)(3) &  
28 U.S.C. § 1915(d)**

25 Daniel S. Pool ("Plaintiff"), an inmate currently held in the Navy Consolidated Brig  
26 Miramar, located in San Diego, California, and proceeding in pro se, has filed a civil rights  
27 Complaint. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead  
28 he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a)  
(ECF No. 2), along with a Motion to Appoint Counsel (ECF No. 3).

1 **I. MOTION TO PROCEED IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United  
3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
4 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only  
5 if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169  
6 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP remains  
7 obligated to pay the entire fee in installments, regardless of whether his action is ultimately  
8 dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.  
9 2002).

10 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a  
11 prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account  
12 statement (or institutional equivalent) for the prisoner for the six-month period immediately  
13 preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,  
14 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial  
15 payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b)  
16 the average monthly balance in the account for the past six months, whichever is greater, unless  
17 the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution  
18 having custody of the prisoner must collect subsequent payments, assessed at 20% of the  
19 preceding month's income, in any month in which the prisoner's account exceeds \$10, and  
20 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.  
21 § 1915(b)(2).

22 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust account  
23 statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at  
24 1119. Plaintiff's trust account statement shows insufficient funds from which to pay a partial  
25 initial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be  
26 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the  
27 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing  
28 fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve"

1 preventing dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to the lack  
2 of funds available.").

3 Therefore, the Court GRANTS Plaintiff's Motion to Proceed IFP (ECF No. 2), and  
4 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance  
5 of the filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant  
6 to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## 7 **II. MOTION TO APPOINT COUNSEL**

8 Plaintiff also requests appointment of counsel in this matter. *See* Pl.'s Mot. for Appoint.  
9 Counsel (ECF Doc. No. 3) at 1. The Constitution provides no right to appointment of counsel  
10 in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the  
11 litigation. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28  
12 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons.  
13 This discretion may be exercised only under "exceptional circumstances." *Terrell v. Brewer*, 935  
14 F.2d 1015, 1017 (9th Cir. 1991). "A finding of exceptional circumstances requires an evaluation  
15 of both the 'likelihood of success on the merits and the ability of the plaintiff to articulate his  
16 claims pro se in light of the complexity of the legal issues involved.' Neither of these issues is  
17 dispositive and both must be viewed together before reaching a decision." *Id.* (quoting *Wilborn*  
18 *v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

19 The Court denies Plaintiff's request without prejudice, as neither the interests of justice  
20 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*, 827  
21 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

## 22 **III. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

23 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
24 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused  
25 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
26 conditions of parole, probation, pretrial release, or diversionary program," "as soon as practicable  
27 after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions of the  
28 PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are

frivolous, malicious, fail to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, courts “have an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however, “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.” *Id.*

As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).<sup>1</sup> *See Lopez*, 203 F.3d at 1126-27. Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may order that service be made by a United States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”).

#### IV. CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

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<sup>1</sup> Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

1           1.       Plaintiff's Motion to Appoint Counsel (ECF No. 3) is **DENIED** without prejudice.

2           2.       Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2) is  
3 **GRANTED**.

4           3.       The Warden for the Navy Consolidated Brig Miramar, or his designee, shall collect  
5 from Plaintiff's prison trust account the \$350 filing fee owed in this case by collecting monthly  
6 payments from the account in an amount equal to twenty percent (20%) of the preceding month's  
7 income and forward payments to the Clerk of the Court each time the amount in the account  
8 exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE  
9 CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

10          4.       The Clerk of the Court is directed to serve a copy of this Order on Warden, Navy  
11 Consolidated Brig Miramar, P.O. Box 452135, San Diego, California 92145-2135.

12           **IT IS FURTHER ORDERED** that:


13          5.       The Clerk shall issue a summons as to Plaintiff's Complaint (ECF No. 1) upon  
14 Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for  
15 each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order,  
16 a certified copy of his Complaint (ECF No. 1), and the summons so that he may serve each named  
17 Defendant. Upon receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s  
18 as completely and accurately as possible, and to return them to the United States Marshal  
19 according to the instructions provided by the Clerk in the letter accompanying his IFP package.  
20 Upon receipt, the U.S. Marshal shall serve a copy of the Complaint and summons upon each  
21 Defendant as directed by Plaintiff on the USM Form 285s. All costs of service shall be advanced  
22 by the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

23          6.       Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the  
24 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42  
25 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to  
26 reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility  
27 under section 1983," once the Court has conducted its sua sponte screening pursuant to 28 U.S.C.  
28 § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on the face

1 on the pleading alone that Plaintiff has a “reasonable opportunity to prevail on the merits,” the  
2 defendant is required to respond).

3 7. Plaintiff shall serve upon the Defendants or, if appearance has been entered by  
4 counsel, upon Defendants’ counsel, a copy of every further pleading or other document submitted  
5 for consideration of the Court. Plaintiff shall include with the original paper to be filed with the  
6 Clerk of the Court a certificate stating the manner in which a true and correct copy of any  
7 document was served on Defendants, or counsel for Defendants, and the date of service. Any  
8 paper received by the Court which has not been filed with the Clerk or which fails to include a  
9 Certificate of Service will be disregarded.

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11 DATED: February 5, 2014

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13 HON. GONZALO P. CURIEL  
14 United States District Judge  
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